

Atty Gen. Op. No. 09 - 1810

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November 23, 2009

Mr. Robert Barry	Ms. Georgia L. Leonhart
116 Chesapeake Street	501 Cedar Street
Dewey Beach, DE 19971	Lewes, DE 19958

**RE: Freedom of Information Act Complaint  
Against Town of Dewey Beach**

Dear Mr. Barry and Ms. Leonhart:

On September 15, 2009, the Delaware Department of Justice ("DDOJ") received a complaint from Mrs. Vivian Barry that the Town of Dewey Beach ("the Town") violated the Freedom of Information Act ("FOIA") in three respects: 1) by privately discussing and "deciding" whether to accept funds from the Delaware Department of Transportation ("DelDOT"), 2) by going into executive session on August 14, 2009 to discuss transferring capital improvement funds to a litigation defense fund, and 3) by refusing to permit public comment at the open meeting on August 14, 2009. On September 23, 2009, the DDOJ forwarded Mrs. Barry's letter to the Town. Before the Town's response was due, Mrs. Barry died. Mr. Barry and Ms. Leonhart substituted as complainants. The Town requested an extension of time to October 19, 2009 to provide its response, which we granted. We received the Town's timely response. This is the DDOJ's determination of your complaint pursuant to 29 *Del. C.* § 10005(e).

### **RELEVANT FACTS**

According to the affidavit of Gordon Elliot, Town Manager, he received notice on from DelDOT on August 3, 2009 that the agency had money available for the Town's "Bayard Avenue project." However, the available DelDOT funds came to less than half the amount the contractor estimated was necessary to complete the project. Between August 4 and 10, 2009, Mr. Elliot contacted each of the Town Commissioners to solicit input as to whether to accept the DelDOT money. On August 10, 2009, Mr. Elliot decided to reject the offer from DelDOT. A few hours after Mr. Elliott communicated that decision to DelDOT, the Town's then-mayor wrote an email that suggests there was a "vote" concerning the money. However, Mr. Elliot states in his affidavit that "[a]t no time during his individual inquiries with the Commissioners did he allow members of the Town Council to receive and comment on other members' opinions and thoughts for the purpose of reaching a consensus on action to take. . . . The final decision to reject the grant was his decision, and not the result of a vote from the Commissioners."

On August 14, 2009, there was a Town Council meeting, during which the Council went into a properly-noticed executive session to discuss pending lawsuits. The discussion concerned, among other things, how to deploy Town funds to defend those lawsuits. After the executive session adjourned, the Council voted publicly to fund a litigation fund. During the public portion of the same meeting, the Mayor refused to accept public comment on the transfer of funds to the litigation fund.

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### **RELEVANT STATUTES**

A meeting, for FOIA purposes, is any “formal or informal gathering of a quorum of the members of any public body for the purpose of discussing or taking action on public business.” 29 *Del. C.* § 10002(b). While 29 *Del. C.* § 10004 requires that all meetings of public bodies be open to the public, it permits a public body to meet in closed (executive) session to discuss specific topics, including “strategy sessions . . . with respect to . . . pending or potential litigation, but only when an open meeting would have an adverse effect on the . . . litigation position of the public body.” 29 *Del. C.* § 10004(b)(4).

### **DISCUSSION**

The Town contends that your complaint does not “establish a *prima facie* showing that the alleged meeting occurred.” The DDOJ does not entertain FOIA complaints that are based solely on speculation. *Del. Att’y Gen. Op. 05-IB10*, 2005 WL 1209240 (Del. A.G. Apr. 11, 2005); *Del. Att’y Gen. Op. 04-IB14*, 2004 WL 1547683 (Del. A.G. June 28, 2004). However, in this case, the then-mayor’s email alluding to a vote on the DelDOT funds is sufficient to raise the question of whether a private meeting was held in violation of FOIA and to put the Town on notice of the complained of conduct. Therefore, we will address whether the series of calls the Town Manager made to the Commissioners violated FOIA.

**Town Manager's Calls to the Commissioners**

In circumstances similar to those that occurred here, the Court of Chancery held that a series of calls between the President of the Board of Education and the individual Board members did not constitute a serial quorum because the calls were “not a means of circumventing the Freedom of Information Act through serial telephone conversations. Rather, these phone conversations were merely a means [to] informally poll the Board to find out how each member was likely to vote . . . . [I]t is apparent that Dr. Graham’s only purpose was to gain a general sense of the Board’s position and to determine if they would be ready to vote at the [scheduled meeting]. . . .” *Tryon v. Brandywine Sch. Dist. Bd. of Educ.*, 1990 WL 15719, \*3 (Del. Ch. April 20, 1990). FOIA is violated by a constructive or serial quorum only where there has been “an active exchange of thoughts and opinions *and* members were asked to vote or adopt a particular point of view or reach a consensus on what action to take.” *Att’y Gen. Op. 06-IB16*, 2006 WL 2435111, \*4 (Del. A.G. Aug. 7, 2006) (emphasis added).

In this case, the Commissioners were neither asked to come to a decision, nor was the decision theirs to make. According to Mr. Elliot, the decision was issue was left to his determination, and he contacted the Commissioners simply to seek their advice or guidance. Either the Town Manager is not a public body, and therefore FOIA does not apply to him, 29 *Del. C.* § 10004(a), or he is a public body of one and is therefore not required to have public meetings. 29 *Del. C.* § 10004(h). Because the decision-maker was the Town Manager, and not the Town Council, the phone calls he made to the

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Council members did not violate FOIA.

#### **Executive Session to Discuss Litigation Fund**

We concluded in a previous opinion that discussion of litigation resources is a proper subject for an executive session. *Att'y Gen. Op. 05-IB18*, 2005 WL 2334346 (Del. A.G. July 8, 2005). Public discussion concerning transferring capital funds into a litigation fund could have had an adverse affect on the Town's litigation position in any of the several lawsuits it was defending. Therefore, the fact that the Town met in executive session to discuss directing resources to the litigation fund in connection with pending or potential litigation does not run afoul of FOIA.<sup>1</sup>

#### **Closing of Public Meeting to Public Comment**

FOIA provides public access to information about government; it gives the public the right to view and copy public records, 29 *Del. C.* § 10003, and to "observe the performance of public officials and to monitor the decisions that are made by such officials in formulating and executing public policy," 29 *Del. C.* § 10001, by attending open meetings of public bodies. 29 *Del. C.* § 10004(a). "Although FOIA entitles citizens to notice of public meetings and to attend meetings of public bodies, *FOIA does not mandate that public bodies allow for public comments at any or all [meetings].*" *Reeder v. Delaware Dep't of Ins.*, 2006 WL 510067, \*12 (Del. Ch. Feb. 24, 2006), *aff'd*,

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<sup>1</sup> N.B., "potential" litigation must be more than hypothetical. There must be "a realistic or tangible threat of litigation based on objective factors." *Att'y Gen. Op. 02-IB12*, 2002 WL 1282812, \*4 (Del. A.G. May 21, 2002).

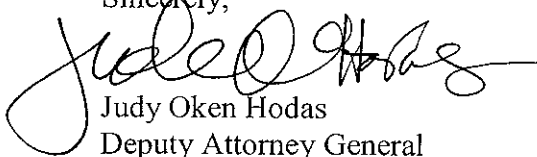
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931 A.2d 1007 (table), 2006 WL 284698 (text) (Del. 2006) (emphasis added). FOIA provides no right for the public to speak at a public meeting.

**CONCLUSION**

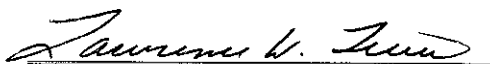
For the reasons stated above, we determine the Town of Dewey Beach did not violate the Freedom of Information Act when the Town Manager spoke to individual Commissioners regarding his decision whether to accept DelDOT grant money, when the Town Council met in executive session to discuss funding a litigation defense fund for pending or potential litigation, or when the Mayor refused to allow public comment at a public meeting.

Sincerely,



Judy Oken Hodas  
Deputy Attorney General

Approved:



Lawrence W. Lewis, State Solicitor

cc: Katrina Barbour, Opinion Coordinator  
Glenn C. Mandalas, Esquire